

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

BASF AGRO B.V., ARNHEM (NL),
WÄDENSWIL BRANCH, BAYER S.A.S.,
and MERIAL LIMITED,

Plaintiffs,

v.

CHEMINOVA, INC.

Defendant.

Civ. Action No. 10-CV-274 (WO)(WWD)

**RESPONSE TO PLAINTIFFS'
MOTION FOR PROTECTIVE ORDER
VACATING POTTER DEPOSITION
NOTICE**

Defendant Cheminova, Inc. (hereinafter "Cheminova") submits this response to Plaintiffs' Motion for a Protective Order Vacating the Notice of Deposition for Plaintiffs' Expert Witness Michael Potter.

Cheminova filed its summary judgment motion over seven weeks ago, on April 4, 2011. *See* Docket Nos. 99 - 108. Plaintiffs' response was due, per applicable federal and local rules, on May 9, 2011. During scheduling conferences held on May 2 and 4, the Court set hearing on Cheminova's summary judgment motion for June 20-21, and instructed the parties to ensure that this motion was fully briefed at least one week in advance of those hearing dates. Counsel for Cheminova immediately began the process of negotiating with Plaintiffs' counsel a schedule for expert discovery and summary judgment briefing that would accommodate the Court's requirements.

On May 10, Plaintiffs' counsel agreed to a schedule that would have depositions of Cheminova's expert witnesses completed on May 26, Plaintiffs' opposition to Cheminova's summary judgment motion filed on May 31, and depositions of Plaintiffs'

expert witnesses Winkler and Potter completed on June 1 and 2, respectively. The parties further agreed that Cheminova would file its reply in support of its summary judgment motion on June 14, and that hearings on Cheminova's summary judgment and on remaining *Markman* issues would be held on the June 20-21 dates set by the Court. *See* Exh. A (May 10 email from K. Raman to R. Burns).

The parties' comprehensive scheduling agreement for the remainder of this case through trial was memorialized in a pending joint motion to amend the scheduling order filed with the Court on May 24, 2011. *See* Docket No. 121. Further, Cheminova served formal deposition notices for Plaintiffs' experts Drs. Winkler and Potter, noticing these depositions for the dates to which Plaintiffs agreed. *See* Exh. B. Cheminova has lived up to its end of the bargain by producing all of its four experts for deposition on a timetable requested by Plaintiffs between May 18 and May 26. But two days after the final deposition of Cheminova's experts was completed, Plaintiffs informed Cheminova that they were unilaterally reneging on their agreement: they refused to produce Dr. Potter for deposition on the agreed date, and further declined to provide alternate near-term dates.

Purporting to cite the Court's recent preliminary injunction decision in the *MANA* case as justification, Plaintiffs' protective order motion -- and now, the just-filed motion to stay all proceedings -- seek an escape from the comprehensive pre-trial schedule Plaintiffs agreed to three weeks ago and as submitted to the Court on May 24. But this is nothing more than a thinly-veiled attempt to prejudice Cheminova by further delaying the resolution of Cheminova's summary judgment motion, and of the claims in this case.

The fact that the Court recently denied a preliminary injunction in the *MANA* case changes nothing with respect to plaintiffs' obligation to produce their expert witnesses on the duly-noticed dates they agreed to. The substantive ground for the Court's recent preliminary injunction decision in the *MANA* case -- disclaimer -- is hardly surprising to the Plaintiffs in the *Cheminova* case, as Cheminova expressly argued it as a basis for its entitlement to summary judgment on the Application Patents. *See, e.g.*, Docket No. 104, p. 16 (filed on April 4). Likewise, the defendants in the *Cheminova* and *MANA* cases argued disclaimer expressly, and at length, in their January 12 claim construction briefing (*see, e.g.*, Docket No. 82, p. 4) and in their May 2 oral arguments to the Court on claim construction (*see, e.g.*, Docket No. 118, pp. 108, 117 *et seq.*). The fact that the Court credited this long-pending argument in its *MANA* preliminary injunction decision provides plaintiffs with no basis to unilaterally refuse to produce its expert witness Potter on the agreed-upon date. Plaintiffs knew, when they agreed to the proposed case schedule and long before the Court's recent decision in *MANA*, that they and their experts needed to address Cheminova's disclaimer argument, and they must still do so now.¹

Plaintiffs' efforts to indefinitely delay the deposition of Dr. Potter must be seen as part and parcel of a larger, and longstanding, tactical plan to delay their day of reckoning in this case. Plaintiffs first sought to defer their agreed-to summary judgment opposition date until June 14, and no doubt hope that this deferral will effectively postpone the

¹ Moreover, the Court's decision in *MANA* addresses just one issue relevant to the construction and application of the Application Patents. Beyond the issue of disclaimer, Cheminova seeks Dr. Potter's testimony on a number of issues (e.g., whether "no quick knockdown" is indefinite) that will not be subject to the Court's claim construction.

current June 20-21 summary judgment hearing date that had been set by the Court.² Plaintiffs then ignored Cheminova's request to schedule an alternate deposition date for Dr. Potter in advance of the current June 14 summary judgment opposition deadline, or alternatively to confirm that they will not rely upon Dr. Potter in their summary judgment opposition. *See* Exh. C. And earlier today, Plaintiffs filed a motion to put the *entire* case on hold for thirty days – including the Manufacturing Patent claims wholly unaffected by the Court's recent claim constructions in *MANA* -- to allow them time to "modify" their expert reports in an attempt to survive the Court's construction of the Application Patents.

This case was filed in April 2010. Rather than put the parties and the Court to the burden of largely duplicative preliminary and final liability determinations, Cheminova agreed to a stipulation that would exclude it from the U.S. fipronil market until summary judgment or trial verdict in its favor, in exchange for Plaintiffs' agreement to an expedited trial setting as soon after March 1, 2011, as the Court's schedule would allow. Since that agreement, Plaintiffs have done everything in their power to delay judgment in this case and to artificially prolong the life of their asserted patent monopoly. *See, e.g.*, Docket No. 92 (reciting history of plaintiffs' earlier discovery delays). The current attempts by Plaintiffs to parlay bad news on the Application Patents in the *MANA* case into indefinite

² Cheminova, however, remains willing and able to do everything in its power to maintain the June 20-21 dates for argument on summary judgment and remaining *Markman* issues. Toward that end, Cheminova is willing to serve its reply papers on its summary judgment motion within four business days following Plaintiffs' service of their opposition papers on or before June 14. In any event, recent developments in the *MANA* case have no bearing whatsoever on the Manufacturing Patent claims present in this case but not in *MANA*. Cheminova submits that argument of *Markman* and summary judgment issues with respect to the Manufacturing Patents should go forward during the June 20-21 timetable set by the Court and agreed by the parties.

delays in determinations of all of the issues and claims in the *Cheminova* case is merely the latest chapter in this long-running pattern of delay for delay's sake.

Accordingly, Cheminova submits that the June 20-21 hearing on Cheminova's summary judgment motion should be maintained, and that accordingly, Plaintiffs should be ordered to produce their experts for deposition on or before June 10, two business days prior to their June 14 summary judgment opposition deadline.

Respectfully submitted this 1st day of June, 2011.

Respectfully submitted,

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/s/ Christopher G. Kelly
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*Attorneys for Defendant and Counter-Plaintiff
Cheminova, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of June, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to:

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Matthew W. Howell	Matthew.howell@alston.com
John Cox	John.cox@alston.com

/s/ Robert J. Burns

Exhibit A

Burns, Robert J (NYC - X73490)

From: Kripa Raman [KRaman@paulweiss.com]
Sent: Tuesday, May 10, 2011 9:45 AM
To: Burns, Robert J (NYC - X73490)
Cc: aruley@belldavispitt.com; Brian Egan; Brian W Lewis; Catherine Nyarady; Kelly, Christopher (NYC - X73264); John E Nathan; john.cox@alston.com; Krumholz, Joshua (BOS - X75820); jpelsevier@jonesday.com; Kenneth A Gallo; rkoch@milbank.com; D'Alessandro, Steven L (NYC - X73528); wdavis@belldavispitt.com
Subject: RE: BASF v Cheminova: Case and Expert Scheduling

Bob -

With respect to deposition scheduling, we can accept your proposed dates for Mampe, McHugh and Winkler. We need to move the Potter deposition date back by one day. We propose alternative dates for Lipton and Forschler, since the ones you proposed do not work for us.

Lipton	5/24
Forschler	5/25 or 5/26
Mampe	5/16
McHugh	5/18
Winkler	5/31
Potter	6/2

Expert discovery would close on June 2. With respect to summary judgment briefing, we propose the opposition brief be due on May 31 and the reply brief be due on June 14, with a hearing on June 20 or 21. We do not agree to further briefing on Markman issues.

We can discuss further on this morning's call.

- Kripa

Kripa Raman | Counsel
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From: Robert.Burns@hklaw.com
To: Kenneth A Gallo/PaulWeiss@PaulWeiss
Cc: aruley@belldavispitt.com, Brian Egan/PaulWeiss@PAULWEISS, Brian W Lewis/PaulWeiss@PAULWEISS, Catherine Nyarady/PaulWeiss@PaulWeiss, Christopher.Kelly@hklaw.com, John E Nathan/PaulWeiss@PaulWeiss, john.cox@alston.com, joshua.krumholz@hklaw.com, jpelsevier@jonesday.com, Kripa Raman/PaulWeiss@PaulWeiss, rkoch@milbank.com, Steven.DAlessandro@hklaw.com, wdavis@belldavispitt.com
Date: 05/09/2011 03:00 PM
Subject: RE: BASF v Cheminova: Case and Expert Scheduling

Ken, thanks. Let's talk at 10:30 am tomorrow. We can use the below dial-in:

Toll-Free: 888-684-4447
International: 719-785-4905
Passcode: 212 513 3490

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From: Kenneth A Gallo [<mailto:KGallo@paulweiss.com>]
Sent: Monday, May 09, 2011 1:00 PM
To: Burns, Robert J (NYC - X73490)
Cc: aruley@belldavispitt.com; Brian Egan; Brian W Lewis; Catherine Nyarady; Kelly, Christopher (NYC - X73264); John E Nathan; john.cox@alston.com; Krumholz, Joshua (BOS - X75820); jpelsevier@jonesday.com; Kripa Raman; rkoch@milbank.com; D'Alessandro, Steven L (NYC - X73528); wdavis@belldavispitt.com
Subject: RE: BASF v Cheminova: Case and Expert Scheduling

Bob:

We will be prepared to discuss all issues with you tomorrow morning, including the dates you suggested last week.

Neither 3 nor 4 today is convenient.

Kenneth A. Gallo | Partner
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Cc: Christopher.Kelly@hklaw.com, joshua.krumholz@hklaw.com, Steven.DAlessandro@hklaw.com, wdavis@belldavispitt.com, aruley@belldavispitt.com
Date: 05/09/2011 12:31 PM
Subject: RE: BASF v Cheminova: Case and Expert Scheduling

Counsel:

Expert deposition dates are this week. Please confirm the dates below that were sent to you last week. Barring agreement, we will promptly involve the court.

We will call you this afternoon at 3 or 4 pm to discuss trial date issues. Please let me know which of those times is convenient for you.

Thanks,
Bob Burns

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From: Burns, Robert J (NYC - X73490)
Sent: Thursday, May 05, 2011 2:33 PM
To: 'Kripa Raman'; 'Catherine Nyarady'; 'john.cox@alston.com'; 'jpelsevier@jonesday.com'; 'rkoch@milbank.com'; 'Brian Egan'; 'Brian W Lewis'; 'jnathan@paulweiss.com'; 'KGallo@paulweiss.com'
Cc: Kelly, Christopher (NYC - X73264); Krumholz, Joshua (BOS - X75820); D'Alessandro, Steven L (NYC - X73528)
Subject: BASF v Cheminova: Case and Expert Scheduling

Counsel:

Further to what I understand were Judge Osteen's instructions during the May 2 and 4 scheduling conferences, attached is a proposed case management schedule for the remainder of this case. As you'll see, this proposed schedule addresses dates for expert discovery, for further briefing on Cheminova's summary judgment motion, and for further briefing of remaining Markman issues in light of expert discovery. We've left blank the line item for the trial date; we're still considering Cheminova's position regarding the liability trial date, in light of Judge Osteen's recent comments, and will be in a position to discuss this issue with plaintiffs early next week.

Also, below are proposed deposition dates for the parties' experts. These dates have been formulated in accord with the proposed summary judgment briefing dates on the attached schedule, and light of plaintiffs' claims that depositions of Cheminova's expert must be completed before plaintiffs can oppose Cheminova's summary judgment motion.

Expert	Date
Lipton	5/12
Forschler	5/13
Mampe	5/16
McHugh	5/18
Winkler	5/31
Potter	6/1

Please let us have your thoughts as soon as possible. If needed, we can make ourselves available for a conference call to discuss the pretrial deadlines and/or the expert deposition schedule on Friday morning. We'll talk next week about trial date issues.

Thanks,
Bob Burns

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To ensure compliance with Treasury Regulations (31 CFR Part 10, Sec. 10.35), we inform you that any tax advice contained in this correspondence was not intended or written by us to be used, and cannot be used by you or anyone else, for the purpose of avoiding penalties imposed by the Internal Revenue Code.

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Exhibit B

Burns, Robert J (NYC - X73490)

From: Burns, Robert J (NYC - X73490)
Sent: Thursday, May 26, 2011 6:17 PM
To: 'BEgan@PAULWEISS.COM'; 'Catherine Nyarady'; 'CBenson@paulweiss.com'; 'JLCohen@PAULWEISS.COM'; 'JNathan@paulweiss.com'; 'KGallo@paulweiss.com'; 'KKemeny@paulweiss.com'; 'KRaman@paulweiss.com'; 'RNumbers@wcsr.com'; 'pmillen@wcsr.com'; 'rkoch@milbank.com'; 'jmalik@alston.com'; 'Smith, Frank'; 'john.cox@alston.com'; 'jpelsevier@jonesday.com'; 'Jarecki-Black, Judy'; Mitchell, Matthew L (BOS - X71418)
Cc: Kelly, Christopher (NYC - X73264); D'Alessandro, Steven L (NYC - X73528); Krumholz, Joshua (BOS - X75820); Stern, Benjamin M (BOS - X72022); Sanborn, Peter I (BOS - X72151)
Attachments: Emailing: Notice_of_depo_of_Michael_Potter__May_26_2011_12_07_21_643, Notice_of_depo_of_Jeffrey_Winkler__May_26_2011_12_06_28_393

Counsel: Attached are deposition notices for next week's depositions of Drs. Potter and Winkler.

Thanks,
Bob Burns

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Plaintiffs,

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Defendant.

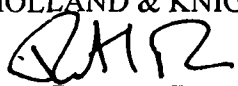
Civ. Action No. 10-CV-274

NOTICE OF DEPOSITION OF MICHAEL POTTER

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, Defendant Cheminova, Inc. will take the deposition of Michael Potter on June 2, 2011, beginning at 9:30 a.m. The deposition will continue from day to day thereafter until completed. The deposition will take place at the offices of Paul, Weiss, Rifkind, Wharton & Garrison LLP, 1285 Avenue of the Americas, New York, NY 10019. The deposition will be by oral examination and may be recorded by any means permitted under Federal Rules of Civil Procedure, including videotaping and stenographic recording.

Dated: May 26, 2011

HOLLAND & KNIGHT LLP



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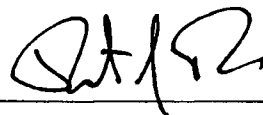
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CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of May, 2011, I served the foregoing via electronic mail on the following:

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**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

BASF AGRO B.V., ARNHEM (NL),
WÄDENSWIL BRANCH, BAYER S.A.S.,
and MERIAL LIMITED,

Plaintiffs,

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Defendant.

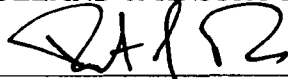
Civ. Action No. 10-CV-274

NOTICE OF DEPOSITION OF JEFFREY WINKLER

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, Defendant Cheminova, Inc. will take the deposition of Jeffrey Winkler on June 1, 2011, beginning at 9:30 a.m. The deposition will continue from day to day thereafter until completed. The deposition will take place at the offices of Paul, Weiss, Rifkind, Wharton & Garrison LLP, 1285 Avenue of the Americas, New York, NY 10019. The deposition will be by oral examination and may be recorded by any means permitted under Federal Rules of Civil Procedure, including videotaping and stenographic recording.

Dated: May 16, 2011

HOLLAND & KNIGHT LLP



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*Attorneys for Defendant and Counter-Plaintiff
Cheminova, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of May, 2011, I served the foregoing via electronic mail on the following:

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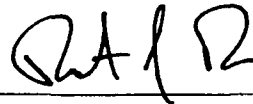


Exhibit C

Burns, Robert J (NYC - X73490)

From: Burns, Robert J (NYC - X73490)
Sent: Tuesday, May 31, 2011 12:44 PM
To: 'BEgan@PAULWEISS.COM'; RNumbers@wcsr.com; 'KGallo@paulweiss.com'; 'CBenson@paulweiss.com'; 'KKemeny@paulweiss.com'; 'pmillen@wcsr.com'; 'JNathan@paulweiss.com'; 'Catherine Nyarady'; 'KRaman@paulweiss.com'; 'JLCohen@PAULWEISS.COM'; 'rkoch@milbank.com'; 'jpelsevier@jonesday.com'; 'john.cox@alston.com'; 'Jarecki-Black, Judy'; 'Smith, Frank'
Cc: Kelly, Christopher (NYC - X73264); Krumholz, Joshua (BOS - X75820); D'Alessandro, Steven L (NYC - X73528)
Subject: BASF et al v Cheminova

Counsel:

We note plaintiffs' protective order motion, and the Court's subsequent order extending plaintiffs' summary judgment opposition date until June 14. We further note plaintiffs' proposed order on the protective order motion, which trades an agreed and properly-noticed deposition date for an amorphous date "shortly after the Court has issued its complete *Markman* order and considered Plaintiffs' forthcoming motion for clarification"

Please provide us with dates Dr. Potter is not available for deposition in NYC between June 3 and June 10. Alternatively, if Plaintiffs do not intend to rely upon Dr. Potter in their June 14 opposition to Cheminova's summary judgment motion, please so advise, as that will certainly influence Cheminova's position on Plaintiffs' protective order motion.

Thanks,
Bob Burns

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robert.burns@hklaw.com | www.hklaw.com

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